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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 589

TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

PETITIONERS' REPLY

Contrary to the statement on page 2 of respondents' brief, a very substantial and important question of federal law is presented in this case. Judge Rives and his colleagues viewed this question as one of first impression, the solution of which is "by no means easy." Unfortunately, respondents, in their brief, have so handled (1) the issues, (2) the facts and (3) the law that it is now even more difficult to come to grips with the problem.

Taking these items in order:

1. The Issues

The basic issue presented to this Court is the same as was presented and argued in the courts below,[1] namely:

[1] Respondents, on page 2 of their brief, state that petitioners' questions presented "do not follow" the assignments of error contained in the petition for rehearing filed with the Court of Appeals. This is not so. Compare question 1 presented to this Court with points IV, XII and XIII in the petition for rehearing contained in the transcript of proceedings below filed in this Court, and likewise compare question 2 with points I, IV, V, VI, XII, XIII, and XVI; question 3 with point II; and question 4 with points III and XVII.

Can a railroad union ignore and frustrate an order of the Interstate Commerce Commission[2] approving the establishment of joint terminal operations by petitioners when:

(1) The order was issued pursuant to the "exclusive and plenary jurisdiction" over such matters vested in the Commission by Congress, and

(2) The union, being fully cognizant of the proposals and knowing that the Commission was considering them, and knowing further that some change would be necessary when the bridge was cut, intentionally refrained from exercising the absolute right, vouchsafed to it by Congress, of intervening in the Commission proceedings.

To avoid meeting this issue, respondents have raised the following spurious issues:

a. *Possibility of continuing operations on same basis as before the bridge was cut.* Respondents say no change in method of operations was necessary. This unwarranted contention flies in the face of the facts as found by the District Court and the plain statement of the Court of Appeals, "The question is not, therefore, to change or not to change, but what to change."[3]

b. *Collusion among the railroads.* This inflammatory and frivolous contention is not supported by a single fact in the record or statement in the opinions of the courts below. It is clearly the type of matter which should have been presented, if at all, to the Commission, had respondents not failed to intervene before the Commission, when that body was considering whether or not the proposed joint terminal operations were in the public interest. What respondents are really saying here is that an application to the Commission for approval of joint operations *of any sort* constitutes

[2] Hereinafter sometimes called the Commission.
[3] 307 F. 2d at 161. Petition, p. 18a.

proof of improper collusion *per se*. If this were so Section 5 of the Interstate Commerce Act[4] would be completely nullified and no changes of the sort here in issue could ever be proposed to or approved by the Commission, despite the fact that Congress clearly intended that they be approved when found to be in the public interest.[5]

c. *The permissive nature of the Commission order.* As this Court well knows, Congress, in 1940, amended the Interstate Commerce Act so that the Commission could issue nothing but permissive orders in such cases. Prior to that time the Commission was supposed to originate and impose consolidation and coordination plans. The 1940 amendment left it to the railroads to originate such plans, but the only way they may be effectuated, after all parties have been heard, is through enforcement of the Commission's orders approving the plans found to be in the public interest. But in this case the order was in effect mandatory since the moving cause for the application and the end result of the order was the cutting of the bascule bridge by the City of Corpus Christi which was a party to the Primary Agreement approved by the Commission's order.

d. *Effect of the Railway Labor Act.*[6] Respondents repeatedly state that petitioners violated the RLA. This is not so. The District Court, with all the facts before it, found no such violation, nor did the Court of Appeals.

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[4] 54 Stat. 899, 49 U.S.C. preceding § 1 *et. seq.*

[5] Again we call the Court's attention to section 5(11) of the Interstate Commerce Act which specifically exempts petitioners and their employees, while effectuating an approved consolidation or coordination, from state and federal restrictions such as are contained in anti-trust laws and the Railway Labor Act. See Appendix E in our Petition for Certiorari.

[6] 48 Stat. 926, 45 U.S.C. § 151 *et seq.*

2. The Facts

It is extremely unfortunate that respondents have misstated certain facts and have attempted to mislead this Court. These same misstatements were made to the Court of Appeals and were rejected by that court.

The statements in question are as follows:

a. "They [petitioners] sought to bolster their positions by securing I.C.C. approval of the changes, yet the joint yard and the CCTA operation of the T&NO's port tracks were instituted before even an application with the Commission was filed." (Respondents' brief, page 18.) (Same appears verbatim on page 31 of respondents' brief in the Court of Appeals.)

Prior to argument, it was pointed out to the Court of Appeals that this statement was untrue and was contradicted (1) by the other statements in the Trainmen's brief (the same is true before this Court — see page 5 of respondents' brief), (2) by the stipulation of the parties (Tr. 65), and (3) by the findings of the District Court (Tr. 287-88). The Court of Appeals, in its opinion, stated:

> "*With the bridge cut and the proposed changes approved,* the railroads put the Primary Agreement and supplemental agreements into effect. . . ."[7] (Emphasis supplied.)

Again we quote respondents' brief:

b. "The Petitioners have likewise even ignored their own agreements in their joint train yard operation, which permits joint operations only on specified tracks in the new yards. T&NO and Tex-Mex now jointly operate over Tex-Mex tracks in the whole

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[7] 307 F. 2d at 154. Petition, p. 4a.

> of the Corpus Christi Terminal, thus depriving Tex-Mex employees of their work." (Respondents' brief, page 17.) (Same appears verbatim on page 30 of respondents' brief in the Court of Appeals.)

This statement is directly contradicted by undisputed testimony that the Trainmen did not lose any jobs under the new operations (Tr. 131-33), and by the findings of the trial court that petitioners, when the bridge was cut,

> "*started railroad operations in accordance with the four contracts,* copies of which were attached to the application with the Interstate Commerce Commission *and in accordance with the authority granted by said Commission in its order of November 16, 1960. Operations in such manner have continued to date.*" (Tr. 287-88) (Emphasis supplied.)

The statement is also contrary to the opinion of the Court of Appeals, which states:

> "With the bridge cut and the proposed changes approved, *the railroads put the Primary Agreement and supplemental agreements into effect. . . .*"[8] (Emphasis supplied.).

Again quoting respondents' brief:

> c. "It is apparent from the evidence in this case that the Petitioners have wholly failed to comply with the obligations imposed by the Railway Labor Act in the labor dispute in question to settle the controversy between the parties by making every reasonable effort either by negotiations or with the aid of available governmental machinery of mediation." (Respondents' brief, page 7.) (Same appears verbatim on page 7 of respondents' brief in the Court of Appeals.)

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[8] *Ibid.*

It cannot be denied that petitioners, contrary to the above, made every effort to settle this dispute within the framework of established procedures, and, in fact, did settle with all the unions affected *except* the Trainmen (Tr. 265-66). Further, it cannot be denied that, as the Court of Appeals put it,

> "[I]n May of 1961, the mediation proceedings were terminated, since no agreement could be reached, *and the union [Trainmen] refused arbitration.*"[9]

It is obvious that the facts argued to this Court by respondents are neither the facts proved in the trial court, nor those found by the trial court and restated by the Court of Appeals.

3. The Law

On the principal question here involved, respondents have attempted to trap the Court with a play on words, just as they did the Court of Appeals. Thus respondents have pitched their whole case on the contention that the dispute here is over a change in "working conditions," the settlement of which is governed by RLA procedures. Petitioners do not deny that "working conditions" are involved in-so-far as they are affected by changes in operations such as the establishment of joint terminal operations, and petitioners have always been ready to negotiate on the working conditions, rules and rates of pay affected by these changes, and have reached agreement on these matters with all the unions except the Trainmen. The point is that the dispute here is not over "working conditions," but over the effectuation of a coordination of facilities approved by the Commission. That this matter is not a subject for bargaining or of a "labor dispute" is amply demonstrated by citation of cases and legislative history in our Petition for

[9] *Id.* at 155. Petition, p. 5a.

Certiorari. Since respondents have not seen fit to rebut these citations, we will not repeat them, except for the following, which is from a statement by Mr. McGrath, the Trainmen's General Counsel, before the House Committee considering the enactment of present Section 5 of the Interstate Commerce Act.

> "An acceptance by railroad labor of the provisions concerning unification which are now proposed cannot but be construed as a tacit agreement on the part of railroad employees that mergers, consolidations, coordinations, and so forth, may be freely made, so long as the interests of labor are 'considered' and some sort of supposed protection given to their interests. . . ."[10]

The "provisions concerning unification" to which Mr. McGrath and the Trainmen were opposed in 1939 and 1940 were subjected to bitter and exhaustive debate, but they were enacted into law and the Trainmen's proposal to leave such matters to collective bargaining was rejected.[11]

The authorities cited by respondents are readily distinguishable from the present case.

First, the Commission's decision in Finance Docket 19432, *Chicago, St. Paul, Minneapolis & Omaha Railway Company Lease* cited and relied on by respondents is clearly not in point. In the first place, there were no circumstances compelling North Western to make the lease. It was free to make it or reject it. In our case petitioners were compelled to change their operations at Corpus Christi when the bascule bridge was cut by the City.

In the second place, in approving the lease of Omaha by North Western, the Commission was not asked to approve,

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[10] Hearings on H.R. 2531 and H.R. 1862 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess. 1292.

[11] See 86 Cong. Rec. 10189.

and did not authorize, an integrated and unified operation of the two lines. However, North Western was trying to obtain labor agreements which would have that effect. As said by the Commission:

> "It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. *The order did not provide any particular method for integration of the physical operations involved. . . .*" (See page 37 of respondents' brief.) (Emphasis supplied.)

In our case petitioners were trying to obtain agreements covering the very manner of operation authorized by the Commission.

In the third place, North Western was asking the Commission to supplement its prior order by prescribing specific procedures which would require North Western and the Trainmen to "concur in a plan of operational revisions." North Western also requested "that express relief be granted from the restraints, limitations and prohibitions of the Railway Labor Act." The Commission held, and rightly so, (1) that it had no authority to order the parties to negotiate and report back to it, and (2) that the terms of Section 5(11) of the Act are *self-executing* and there is no need for the Commission "expressly to order or declare that a carrier be relieved from certain restraints," it being sufficient to specify clearly what the carrier is authorized to do, and thereafter the Courts can and should determine from what restraints the carrier is relieved.

Respondents also rely on *Order of Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, and assert that each of petitioners' contentions and arguments in the pres-

ent case was "covered" and "laid to rest" in the *Telegraphers* case. This same statement was made to the Court of Appeals, which, after considering the same, concluded:

> "[S]urprisingly, [this] appears to be a case of first impression."[12]

As the Court of Appeals apparently realized, the *Telegraphers* case is readily distinguishable from our case. As this Court pointed out in its opinion, the demand of the union would not require the railroad in the *Telegraphers* case "to violate any . . . valid order of any public agency."[13] In fact, the *Telegraphers* case did not involve an order of the Interstate Commerce Commission, but rather actions before *state* agencies. On the other hand our case *does* involve a valid order of the Commission covering transactions with reference to which the authority of the Commission is made "exclusive and plenary." Another important difference is that our case, unlike the *Telegraphers* case, involves transactions where Congress has prescribed mandatory protection for employees adversely affected thereby. This provision, as shown by its Congressional history, was adopted as a part of the pattern of railway labor legislation.[14] A further point of difference is that in our case the trainmen have lost no jobs as a result of the consolidation, whereas in the *Telegraphers* case numerous jobs were eliminated.

Nor are any of the other cases cited by respondents either controlling or persuasive here. *Lee Way Motor Freight Inc.* v. *Keystone Freight Lines*, 126 F. 2d 931 (10th Cir. 1942) and *East Texas Motor Freight Lines* v. *International Bhd of Teamsters*, 163 F.2d 10 (5th Cir., 1947) are clearly not in

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[12] 307 F. 2d at 155. Petition, p. 5a.

[13] 362 U.S. at 340.

[14] See Appendices D and E to our Petition for Certiorari.

point. Neither involved Section 5 of the Interstate Commerce Act nor any *specific order or action* by the Commission. Neither involved any provision in the Act which was part of the pattern of labor legislation. There was no need to reconcile the Norris-LaGuardia Act with specific provisions of the Interstate Commerce Act in order to make effective a clearly expressed and subsequently enacted congressional intent appearing in the latter.

With reference to the *East Texas Motor Freight Lines* case, *supra*, and *W. L. Mead, Inc.* v. *International Bhd of Teamsters*, 217 F. 2d 6 (1st Cir. 1954), this Court stated in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 353 U.S. 30 at page 42:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other statute. We believe that these are inapposite to this case. *None involved the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation.*" (Emphasis supplied.)

The foregoing applies equally to all the cases cited by respondents. Each is distinguishable from our case for the following reasons:

1. None involved a choice between either the defeat of a clearly expressed, specific federal policy enunciated in an Act of Congress passed after the enactment of Norris-LaGuardia, or the reconciliation of that policy with Norris-LaGuardia.

2. None involved an effort by a union, through strike action or otherwise, to nullify a specific order issued by the Commission under Section 5 of the Act.

3. None involved a determination whether a union can strike to nullify an authorization granted by a federal agency whose jurisdiction in the premises Congress has declared to be "exclusive and plenary."

The foregoing comments apply to the above cases and to *Afran Transport Co.* v. *National Maritime Union*, 169 F. Supp. 416 (D.C.S.D. N.Y. 1958); *Alcoa S. S. Co., Inc.* v. *McMahon*, 173 F. 2d 567 (2d Cir. 1949); *Arnold* v. *Louisville & N R. Co.*, 180 F. Supp. 429 (D.C.M.D. Tenn. 1960); *A. H. Bull S.S. Co.* v. *Seafarers' Int'l Union*, 250 F. 2d 326 (2d Cir. 1957); *Butte, A. & P. Ry. Co.* v. *Brotherhood of Locomotive Firemen and Engineers*, 268 F. 2d 54 (9th Cir. 1959).

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In enacting Section 5 of the Interstate Commerce Act in 1940, Congress acted with great prescience. The solutions provided therein for the resolution of problems arising from consolidation and coordination of railroad operations recognized the interest of the public in such matters as well as the interests of the brotherhoods and the railroads. Thus Congress provided specifically that consolidations of facilities such as the establishment of joint terminal facilities should be aired in a tripartite forum before being put into effect. The Commission was directed to consider all matters of *public* interest involved. At the same time both the brotherhoods and the railroads were accorded the absolute right to participate in the deliberations and assert their views. Further, and most important, Congress ringed the whole procedure with provisions designed, as Representative Wolverton said, to give,

> "railroad workers protection against sudden dismissal and financial assistance that is not enjoyed by workers in any other industry."[15]

Respondents' disregard of the legislative history of Section 5 cited by petitioners is an eloquent testimonial to the force with which that history supports petitioners' case. The Trainmen are not unaware of this history, since they

[15] 86 Cong. Rec. 10189.

were primarily responsible for the difficulty President Roosevelt and his proponents in Congress had in achieving the enactment of Section 5. Their silence before this Court is understandable since they *lost* their battle in Congress to leave all matters covered by Section 5 to collective bargaining — yet they hope to achieve that very same result in this case.

The exclusive and plenary jurisdiction granted to the Commission by Congress was granted only after long and careful deliberation. It should not be withdrawn summarily. If it is, the public interest is left without a champion, and the determination of these important matters which Congress thought it had vested in the Commission will be relegated to the arena of economic force.

CONCLUSION

Petitioners respectfully request that Certiorari be granted.

Respectfully submitted,

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